No. 85-1581

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF DEFENSE APPELLATE DIVISION, UNITED STATES ARMY, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER it is constitutionally permissible for the military to exercise court-martial jurisdiction over an offense which, upon application of the detailed analysis mandated by this Court, is not "service connected".

II. WHETHER any cogent or compelling reasons exist for the Court of Military Appeals to depart from a detailed application of the "service connection" test set forth by this Court in *O'Callahan* and *Relford*.

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The parties have consented to the submission of this *amicus curiae* brief by the Defense Appellate Division in support of the petitioner. Copies of the consents have been filed with the court.

INTEREST OF THE DEFENSE APPELLATE DIVISION

The Defense Appellate Division represents soldier-clients before the U.S. Army Court of Military Review, the U.S. Court of Military Appeals and the U.S. Supreme Court pursuant to Article 70(c), Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 870(c) (1982). The Division is the principle source of appellate representation for all convicted Army soldiers who are sentenced to a punitive discharge or confinement for one year or more. In 1985, Defense Appellate Division attorneys represented over 2200 soldiers before the U.S. Army Court of Military Review.[1]

[1] Defense Appellate Division, 1985 Annual Report.

The Defense Appellate Division represents soldiers who have been[2] and will be adversely affected by the decision of the U.S. Court of Military Appeals in this case. If permitted to stand, the decision in this case will encourage an expansion of military jurisdiction and deprive a potentially significant number of soldier-clients of fundamental rights and protections they would have enjoyed if prosecuted in Article III courts.

STATEMENT OF THE CASE

The petitioner was charged with committing a variety of sex offenses[3] against two dependent daughters of active duty Coast Guard members. These offenses were alleged to have occurred in petitioner's private home located eleven miles from his place of duty, the federal office building in downtown Juneau, Alaska. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). The petitioner had minimal military contacts with the fathers of the alleged victims.

The allegations against petitioner were made after he and the fathers of the alleged victims were permanently transferred from Juneau, Alaska. *United States v. Solorio*, 21 M.J. at 514. The state of Alaska deferred prosecution of petitioner to the "legal prosecutional arm of the Coast Guard" but was, at the time of petitioner's trial, continuing to investigate the allegations. (Appellate Exhibit IX; R. 87).

At trial, the defense moved to suppress the specifications alleging sex offenses at Juneau, Alaska, for lack of subject matter jurisdiction.[4] After hearing evidence and argu-

[2] The government recently appealed one case which had been dismissed at trial for lack of subject matter jurisdiction. Based on the decision in the Solorio case, the Army Court of Military Review reversed the military judge's ruling and reinstated the charges. United States v. Abell, Misc. Docket No. 1986/1 (A.C.M.R. 11 March 1986) (unpub.) (Appendix A).

[3] Petitioner was alleged in 14 separate specifications to have committed attempted rape, indecent and simple assaults, lascivious acts and indecent liberties in violation of Articles 80, 128 and 134, UCMJ.

[4] Several additional specifications alleged that petitioner committed sex offenses at a military base on Governor's Island, New York. These were not included in the defense motion to dismiss.

ments on the motion, the military judge granted the defense motion and dismissed the specifications alleging offenses at Juneau, Alaska. In his essential findings of facts, the military judge found that none of the *Relford v. Commandant*, 401 U.S. 355 (1970) [hereinafter referred to as *Relford*] factors supported a finding of service-connection. Pursuant to Article 62, UCMJ, the government appealed the military judge's ruling to the Coast Guard Court of Military Review, which granted the government appeal and reversed the ruling of the military judge. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). The United States Court of Military Appeals subsequently granted review of the Coast Guard Court's decision and affirmed. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986). The Appellant petitioned both the Court of Military Appeals and this Court for a stay pending review by this Court.

The petitioner was tried on March 11, 1986, after both this Court and the Court of Military Appeals denied petitioner's stay. He was convicted of eight offenses committed in Alaska.

ARGUMENT

I. BECAUSE IT ENTAILS THE LOSS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, COURT-MARTIAL JURISDICTION HAS HISTORICALLY BEEN RESTRICTED TO THAT ABSOLUTELY ESSENTIAL TO MAINTAIN DISCIPLINE.

One of the early grievances protested by the American colonists was that crimes committed by soldiers should be tried in civil, not military courts. *Reid v. Covert*, 354 U.S. 1, 27-28 (1957); *O'Callahan v. Parker*, 395 U.S. 258 (1969) [hereinafter referred to as *O'Callahan*]. As a result of these views, court-martial jurisdiction was extremely limited in the first Articles of War.[5] Throughout the early history of this country, attempts to broaden the scope of court-martial jurisdiction beyond its traditional limits were repelled by the

[5] The Articles of War enacted by the Continental Congress in 1776 were largely patterned after the British articles which required soldiers accused of offenses punishable by civilian courts to be delivered to a civil magistrate. 1776 Articles of War, Section X, Article 1, reprinted in W. Winthrop, *Military Law and Precedents*, 964 (2d Ed. 1920).

judiciary which reaffirmed the basic precept that military courts are subordinate to civilian tribunals. *See, e.g., Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866). However, through a series of legislative enactments culminating with the passage of the Uniform Code of Military Justice in 1950 [hereinafter referred to as 1951 Code], court-martial jurisdiction was gradually expanded.[6]

This Court took an active role in defining the limits of court-martial jurisdiction after enactment of the 1951 Code and reversed the legislative trend toward expanding military jurisdiction. In *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), this Court held that an ex-serviceman was not amenable to court-martial jurisdiction after being discharged for an offense committed five months before his discharge. According to this Court, the attempted encroachment on the jurisdiction of Article III courts was constitutionally impermissible. This Court reasoned that nothing in the "history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property." *Id.* at 17.

Using a similar rationale, this Court struck down a section of the 1951 Code authorizing trial by court-martial of dependents accused of committing capital offenses even though they may be accompanying our Armed Forces abroad. *Reid v. Covert,* 354 U.S. 1 (1957). Citing the deficiencies of the military justice system, the Court concluded that a "military trial does not give an accused the same protection which exists in the civil courts." *Id.* at 37.

In *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234 (1960), this Court extended the holding in *Reid v. Covert, supra,* and held that the peacetime prosecution of a soldier's dependent wife for a noncapital offense committed overseas was not constitutionally permissible under Article III and the

[6] The expansive approach taken by Congress in the 1951 Code is reflected in Article 2 which included, under certain circumstances, military jurisdiction over civilians. Uniform Code of Military Justice, Article 2(11), 50 U.S.C. § 552 (1956).

fifth and sixth amendments.[7] In two related cases, this Court further limited court-martial jurisdiction over civilian dependents of serviceman and over civilian employees of the government. *Grisham v. Hagen,* 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo,* 361 U.S. 281 (1960).

These cases set the stage for the landmark case which restricted court martial jurisdiction only to those offenses that are "service-connected". *O'Callahan v. Parker, supra.* Justice Douglas, writing for the majority, recognized the power of Congress to make rules for the regulation of land and naval forces, but expressed the view that court-martial jurisdiction must be restricted to the narrowest "deemed absolutely essential to maintaining discipline among troops in active service." *Id.* at 265, *quoting Toth v. Quarles,* 350 U.S. at 22. In *O'Callahan,* the Court extensively reviewed the history of court-martial jurisdiction and observed that this historically restrictive approach was appropriate because "a civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 266. This Court rejected the government's contention that the status of the accused alone was determinative, and listed several factors to determine whether an offense was sufficiently service connected to constitutionally permit military prosecution.

In *Relford,* this Court considered whether a court-martial had jurisdiction over rape and kidnapping offenses committed by a servicemenber on a military post by reference to the factors cited in *O'Callahan.* Although noting that some factors[8] operated against finding jurisdiction, the Court

[7] The only test for determining court-martial jurisdiction at the time of this decision was "one of *status,* namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.' " Kinsella v. United States ex rel. Singleton, 361 U.S. at 240-241.

[8] The factors listed in Relford are: 1) the serviceman's proper absence from the base, 2) the crime's commission away from the base, 3) its commission at a place not under military control, 4) its commission within our territorial limits and not in an occupied zone of a foreign country, 5) its

nevertheless held that "a serviceman's crime against the person of an individual upon the base or against property on the base is service connected" within the meaning of the requirement as specified in *O'Callahan*. . . ." *Id.* at 369. The Court in *Relford* reaffirmed the continued vitality of *O'Callahan*, but observed that its decision "marks an area, perhaps not the limit, where court-martial [jurisdiction] is appropriate and permissible." *Id.* at 369.

In the most recent case addressing the limits of court-martial jurisdiction, *Schlesinger v. Councilman*, 420 U.S. 738 (1975), a majority of this Court decided that a federal court should not enjoin a pending court-martial on the ground that the charges were not service connected. This Court theorized that the judgment of the military court was indispensible to determining factors relevant to gauging service connection, such as the impact of the offense on military discipline and whether the military interest can be adequately vindicated in civilian courts. *Id.* at 759. The majority in *Councilman*, while properly desiring to have the benefit of the military tribunals' views on the impact of a particular offense on discipline, clearly did not overrule *O'Callahan* or express an opinion that can be interpreted as authorizing anything less than applying the detailed service connection analysis set forth in *O'Callahan* and *Relford* to resolve questions of military jurisdiction.

II. THE COURT OF MILITARY APPEALS, IN A SERIES OF CASES CULMINATING IN THE INSTANT CASE, HAS GRADUALLY ERODED THE SERVICE CONNECTION TEST AND EXPANDED COURT-MARTIAL JURISDICTION BEYOND ITS OWN ESTABLISHED PRECEDENT.

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commission in peacetime and its being unrelated to authority stemming from the war power, 6) the absence of any connection between the defendant's military duties and the crime, 7) the victim's not being engaged in the performance of any duty relating to the military, 8) the presence and availability of a civilian court in which the case can be prosecuted, 9) the absence of any flouting of military authority, 10) the absence of any threat to a military post, 11) the absence of any violation of military property, 12) the offenses being among those traditionally prosecuted in civilian courts.

The task of implementing *O'Callahan* and *Relford* was largely left to the Court of Military Appeals.[9] That court was initially intent on following the mandate set forth in those cases:

> What *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.

United States v. Moore, 1 M.J. 448, 450 (C.M.A. 1976). The court's detailed application of the jurisdictional criteria enunciated in *O'Callahan* and *Relford* led to determinations of a lack of jurisdiction in a significant number of military cases[10] involving a variety of off-post offenses including the use, sale and transfer of drugs,[11] sex offenses,[12] and property crimes.[13] In several of these cases, the court found that

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[9] From time to time, however, federal courts have intervened *See, e.g.*, Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); Reed v. Middendorf, 383 F.Supp. 488 (C.D. Cal. 1974); Chastain v. Siay, 365 F. Supp. 522 (D. Colo. 1973).

[10] *See generally* the cases cited in Annot., 14 A.L.R. Fed. 152, § 20 (1973). *See also* Cole v. Laird, *supra* at n.9.

[11] United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979); United States v. Conn, 6 M.J. 351 (C.M.A. 1979); United States v. Klink, 5 M.J. 404 (C.M.A. 1978); United States v. Alef, 3 M.J. 414 (C.M.A. 1977); United States v. Williams, 2 M.J. 81 (C.M.A. 1976); United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976). These cases retracted the earlier view of the Court of Military Appeals that drug offenses were virtually *per se* service connected. *See* United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

[12] United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Borys, 18 C.M.A. 547, 40 C.M.R. 259 (1969).

[13] United States v. Hopkins, 4 M.J. 260 (C.M.A. 1978); United States v. Sims, 2 M.J. 109 (C.M.A. 1977); United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976); United States v. Uhlman, 1 M.J. 419 (C.M.A. 1976); United States v. Camacho, 19 C.M.A. 11, 41 C.M.R. 11 (1969); United States v. Crapo, 18 C.M.A. 594, 40 C.M.R. 306 (1969); United States v. Chandler, 18 C.M.A. 593, 40 C.M.R. 305 (1969); United States v. Prather, 18 C.M.A. 560, 40 C.M.R. 272 (1969).

there was no service connection even though, as in this case, the victim of the offense was a military dependent.[14]

Adherence to the *O'Callahan-Relford* jurisdiction test continued until 1980 when the court re-examined the restrictive approach it had followed in drug cases and adopted the more expansive view that "almost every involvement of service personnel with the commerce in drugs is 'service connected.'" *United States v. Trottier*, 9 M.J. 337, 350 (C.M.A. 1980). The court recognized that it was departing from its established analysis of strictly applying the *Relford* criteria but opined that a more flexible application of the concept "could be implied" from this Court's opinions. *Id.*

Three years later the court held that a court-martial had jurisdiction to try a soldier for off-post larcenies committed by using a stolen military identification card. *United States Lockwood*, 15 M.J. 1 (C.M.A. 1983). While admitting that this result was not consistent with its precedents, the court stated that it now attached "considerable importance" to circumstances previously considered insignificant. *Id.* at 10. Understandably perplexed, Judge Fletcher wrote:

> I cannot fault a court for reconsidering decisions they feel were decided contrary to the law at the time of those decisions. I do, however, have a problem when the court uses the same decisions available to the former sitting court and arrives at a contrary conclusion without an adequately expressed rationale as to why the earlier decisions were contrary to the law.
>
> . . . .
>
> The reasons advanced by the majority for jurisdiction resting in the military society seem to be related more to the question of organizational vanity rather than answering a strict question of law. . . .

Id. at 10-11. (Fletcher, J., dissenting).

The trend of expanding court-martial jurisdiction continued in subsequent cases. The court held that the use of drugs by a serviceman on extended leave far from a military installation would be service-connected if he re-enters the installation subject to the effects of the drug. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983). It summarily affirmed a lower court decision which broadly held that military jurisdiction vested over any offense committed by servicemen overseas. *United States v. Holman*, 19 M.J. 784 (A.C.M.R. 1984), *aff'd*, 21 M.J. 149 (C.M.A. 1985), *cert. denied*, ____ U.S. ____ (1986). *See also United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

[14] *See, e.g.*, United States v. McGonigal, *supra*; United States v. Shockley, *supra*. *See also*, United States v. Snyder, 20 C.M.A. 102, 42 C.M.R. 294 (1970); United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

The instant case is a significant step toward completely eroding the *O'Callahan* and *Relford* service-connection test and substituting in its place an everchanging unenforceable standard. The court in *Solorio* recognized that finding court-martial jurisdiction over off-base sex offenses against civilian dependents was inconsistent with its previous decisions. However, the court once again rationalized departing from precedent by stating that "earlier opinions on service-connection should be reexamined in light of more recent conditions and experience." *United States v. Solorio*, 21 M.J. at 254. The "new development" cited by the court was society's greater "concern for the victims of crimes." *Id.* at 254. Ultimately, the court concluded that service connection may be predicated upon the "continuing effect on the victims and their families 'which ultimately impacts' on the morale of any military unit or organization to which the family member is assigned." *Id.* at 256.

A. THE DECISION BELOW IS CONTRARY TO *O'CALLAHAN* AND *RELFORD* AND DEVOID OF PERSUASIVE RATIONALE.

It is well settled that "[t]he determination of service connection should be made after a particular consideration of the factors set forth in *Relford*, and the explicit constitutional values that motivated the *O'Callahan* court." *Reed v. Middendorf*, 383 F. Supp. 488, 489-90 (C.D. Cal. 1974). The approach taken by the court in this case completely fails to comply with either of these constitutionally required and essential steps. The court in this case obviously did not engage in a "detailed, thorough analysis" of the *Relford* jurisdictional criteria, but instead predicated jurisdiction solely upon the unsubstantiated, presumed, indirect impact the offense had on the

military. The record is devoid of any direct or empirical evidence that the offenses had a greater impact upon the morale of the military organization than the commission of any other serious offense. The court virtually ignored the findings of the military judge which are detailed and specific, and which uniformly militate against subject matter jurisdiction. It is equally apparent that little heed was given to the principal premise upon which the *O'Callahan* decision rests: that military jurisdiction deprives citizens of the fundamental protections guaranteed by the Bill of Rights and Article III of the Constitution, and must be limited "to the least possible power adequate to the end proposed." *O'Callahan v. Parker, supra* at 265, *citing Toth v. Quarles, supra* at 23.[15] The unwarranted expansion of court-martial jurisdiction in this case is accomplished by depriving petitioner of such basic and fundamental rights as a trial free from possible coercion or influence by the executive or legislative branch, indictment by a grand jury, and the right to trial by jury. *Toth v. Quarles*, 350 U.S. at 16.

No persuasive rationale exists for departing from established law to permit the military to prosecute Yeoman First Class Solorio for the off-post offenses committed in Alaska. Virtually the only "service connection" relied upon by the court to sustain jurisdiction is the "continuing effect" of the offenses on the victims and their families. This effect was, under the circumstances of this case, no different than the effect a sex crime typically has on any victim and his or her family. The facts revealed that the parties had only limited military contacts and were not even stationed together when the offenses were reported. Yeoman First Class Solorio's offenses had no direct impact on the military and actually presented less of a risk of harm to the reputation and honor of the Coast Guard than many other crimes clearly falling

[15] "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." Toth v. Quarles, *supra* at 22.

within the purview of civilian courts. The service connection in this case is simply too superficial and indirect to support a finding of court-martial jurisdiction.

The court below appears to recognize the lack of service-connection in this case based on a traditional analysis. The court therefore ignores the *O'Callahan-Relford* factors and considers the pendency of other military charges and the failure of the civilian courts to prosecute as primary factors supporting military jurisdiction. However, nothing in *O'Callahan* or *Relford* suggests that these considerations are relevant to the service connection inquiry.[16] The omission of these considerations from the *Relford* service connection analysis is sound. The military's interest in trying all alleged offenses at the same time does not, and should not, equate to a license to prosecute soldiers for offenses which are not otherwise sufficently service connected.[17] Similarly, the fact that a civilian jurisdiction has deferred prosecution does not rationally support the exercise of military jurisdiction over off-post, civilian-type offenses. The outer limits of military jurisdiction should not be allowed to fluctuate to accommodate the peculiar whims and changing interests of local jurisdictions. The foregoing considerations are perhaps appealing from a cost-effectiveness standpoint, however, the decision to deprive soldier citizens of their right to be tried in Article III courts should be based on factors more compelling than economics or convenience. These two factors should not be considered pertinent to the service-connection inquiry and the court's reliance on them reflects a fundamental misunderstanding of the teachings of *O'Callahan*.

[16] *See* United States v. Shockly, *supra*, in which similar off-post charges were dismissed, even though other service-connected charges existed.

[17] Even assuming, *arguendo*, that the pendency of other charges is relevant to the service connection inquiry, the two sets of offenses in this case were so unrelated in time, place, and circumstances, that any benefit to trying all offenses together is negligible and does not outweigh the infringement of petitioner's constitutional rights. *Cf.* United States v. Scott, *supra*, (exercise of military jurisdiction over pendant off-post offenses can be supported when the offenses are closely related in time, place, and circumstances to the on-post offenses).

B. THE MILITARY JUSTICE SYSTEM TODAY FAILS TO PROVIDE THE SAFEGUARDS AFFORDED BY ARTICLE III COURTS AND THERE HAVE BEEN NO SIGNIFICANT CHANGES IN MILITARY OR CIVILIAN SOCIETY NECESSITATING THE OVERRULING OR LIMITING OF *O'CALLAHAN* AND *RELFORD*.

Some improvements have taken place in the military justice system since *O'Callahan* was decided,[18] however, the military justice system does not, and perhaps can not provide the two essential safeguards considered most significant by this Court in *O'Callahan*; grand jury indictment and trial by jury. Moreover, unlike Article III courts, the presiding officer in a court-martial is not a judge whose "objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition." *O'Callahan v. Parker*, 395 U.S. at 264.

Tampering with the delicate balance so vital to the fair administration of criminal justice continues to plague the military justice system despite repeated efforts to eradicate the problem.[19] As this Court so aptly stated, "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles*, 350 U.S. at 17.

[18] Most of the improvements were accomplished by the passage of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. These changes were apparently not considered significant enough by this Court to overrule O'Callahan when Schlesinger v. Councilman, *supra*, was decided seven years after the Act was passed into law.

[19] Military courts "have always been subject to varying degrees of 'command influence'." Reid v. Covert, 354 U.S. at 36. Since O'Callahan was decided, federal and military courts have been confronted with recurring instances of unlawful command influence. *See generally*, Homey v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); United States v. Brice, 19 M.J. 170 (C.M.A. 1985); United States v. Rosser, 6 M.J. 267 (C.M.A. 1979). These attempts to impermissibly influence trials call into question the integrity of the military judical system itself. The issue of unlawful command influence of military commanders upon the integrity of the military judical system is again being litigated in military appellate courts. *See, e.g.*, United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984), *pet. granted*, 19 M.J. 281 (C.M.A. 1985); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *pet. granted*, ___ M.J. ___. (C.M.A. 1986).

The interests the military seeks to vindicate in its courtrooms remain substantially unchanged since the *O'Callahan* decision. Furthermore, there has been no dramatic change in the capability or interest of civilian jurisdictions in prosecuting and punishing criminals. Notwithstanding the conclusion of the court below, the military judicial system is no better equipped to protect the rights of victims than state and federal courts. The expansive approach the Court of Military Appeals has taken toward military jurisdiction in this and other recent cases cannot logically be justified by significant developments in military or civilian society. There is simply no cogent or compelling reason for the court below to depart from the decisions of this Court that military courts are subordinate to civilian courts and should be used only when required by military necessity.

C. THE ISSUE IN THIS CASE IS SUBSTANTIAL AND MERITS THE INTERVENTION OF THIS COURT.

The issue in this case is significant and necessitates this Court's intervention at this interlocutory stage of petitioner's court-martial. The issue presented was fully litigated at trial and at both the Coast Guard Court of Military Review and the Court of Military Appeals prior to their decisions being rendered. *Cf. Schlesinger v. Councilman*, *supra*. The petitioner has exhausted his military remedies and will suffer serious harm if this Court allows the decision below to stand. The right of the military accused to appeal to this Court is completely dependent on the Court of Military Appeal's exercise of its discretionary review powers.[20] The petitioner could be deprived of an opportunity to present the significant issues in this case to this Court for appropriate resolution at a later stage if the court below denies the petition for grant of review.[21] Moreover denial of certiorari will have conse-

[20] 10 U.S.C. § 867(h)(1)(Supp. III 1985).

[21] If no other issue exists in the case, it is quite possible that the court below will not exercise its discretionary review power because it has

quences which transcend this case. The broad strokes painted by *Solorio* and other recent cases set a dangerous precedent which will discourage service courts of review and military trial courts from making the constitutionally required detailed analysis of the *Relford* factors to "the precise set of facts in which the offense has occurred." *Schlesinger v. Councilman*, 420 U.S. at 760.[22] Thus, numerous other servicemen will face a risk of being improperly subjected to court-martial prosecution if the decision in the case is allowed to stand.

CONCLUSION

The decision in this case constitutes an unwarranted and unconstitutional extension of court-martial jurisdiction which vitiates the limits set forth by this Honorable Court in *O'Callahan* and *Relford*, and transcends the outer boundaries established by the court's initial decisions. The expansion of military jurisdiction beyond its proper domain is not justified by changes in society, improvements in the military justice system, or any other persuasive rationale. This Court should reaffirm the principles set forth in *O'Callahan* and hold that

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previously considered the jurisdictional issue. Further, if the court grants on an unrelated issue, the petitioner may be precluded from litigating the jurisdiction issue.

[22] Indeed, this has already taken place in one case where the Army Court of Military Review stated that in light of Solorio, "a detailed application of the O'Callahan and Relford factors is unnecessary to resolve the jurisdictional issue." United States v. Stover, SPCM 21611, slip op. at 3 (A.C.M.R. 26 Feb. 1986). (unpub.) (Appendix B).

the constitutional rights of those who serve our country in uniform will not be sacrificed on the altar of current societal trends.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES ARMY COURT
OF MILITARY REVIEW

Miscellaneous Docket No. 1986/1

UNITED STATES, APPELLANT

v.

STAFF SERGEANT RANDY W. J. ABELL, 516-72-8041,
UNITED STATES ARMY, APPELLEE

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11 March 1986

Before YAWN, WILLIAMS, and KENNETT, Appellate Military Judges

For Appellant: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Joseph A. Rehyansky, JAGC (on brief).

For Appellee: Colonel Brooks B. La Grua, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Major Eric T. Franzen,. JAGC, Captain David W. Sorensen, JAGC (on brief).

MEMORANDUM OPINION

Per Curiam:

Pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (Supp. I 1983), and in accordance with Rule for Courts-Martial 908, Manual for Courts-Martial, United States, 1984, the government appeals the trial judge's ruling that the military lacks subject matter jurisdiction over the offenses alleged in the case.

Appellee was arraigned at a general court-martial at Fort Rucker, Alabama, on three specifications alleging indecent acts with children under the age of 16 years, violations of Article 134, UCMJ. The facts show, *inter alia*, the alleged offenses occurred in appellee's trailer at a trailer court in Daleville, Alabama. The trailer court is located adjacent to Fort Rucker, separated from the installation by a railroad track, but six to eight miles from the main cantonment. Each of the alleged victims were dependents of soldiers and resided in the same trailer court as did the accused. Approximately 80 percent of the residents of this trailer court consisted of soldiers and their dependents. No evidence was presented, however, showing any contact or activity between the appellee and the alleged victims or their military fathers occurring on Fort Rucker.

Having reviewed the record and carefully considered briefs filed by both the government and the appellee, we conclude that the offenses alleged are "service connected" and that the military judge erred by dismissing them for lack of subject matter jurisdiction. *United States v. Solorio*, 21 M.J. 251 (CMA 1986).

The appeal of the United States pursuant to Article 62, UCMJ, is granted. Accordingly, the ruling of the military judge dismissing the charge and specifications is vacated, and the record will be returned to the military judge for action not inconsistent with this opinion.

For the Court:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX B

UNITED STATES ARMY COURT
OF MILITARY REVIEW

SPCM 21611

UNITED STATES, APPELLEE

v.

PRIVATE (E-2) FLOYD F. STOVER, 378-84-3384,
UNITED STATES ARMY, APPELLANT

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26 FEBRUARY 1986

Before RABY, CARMICHAEL, and ROBBLEE, Appellate Military Judges

For Appellant: Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Martin B. Healy, JAGC, Captain Pamela G. Montgomery, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutentant Colonel Adrian J. Gravelle, JAGC, Major Byron J. Braun, JAGC, Captain John F. Burnette, JAGC (on brief).

MEMORANDUM OPINION

CARMICHAEL, Judge:

Pursuant to his pleas, appellant was convicted of negligently destroying a military vehicle, operating the same vehicle in a reckless manner, and assaulting another servicemember, in violation of Articles 108, 111, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 908, 911, and 928 (1982), respectively. His sentence to a bad conduct discharge, four months confinement, forfeiture of $400.00 pay per month for six months, and reduction to Private (E-1) was approved by the convening authority.

Appellant makes the same arguments before this court that he advanced at trial. First, he contends that the offenses of destroying a military vehicle and operating the same vehicle in a reckless manner are multiplicious for findings. Second, he challenges his assault convictions on the theory that it is not service connected, and thus not subject to court-martial jurisdiction. We find both arguments unpersuasive.

At trial the military judge ruled that appellant's reckless operation and subsequent destruction of a military vehicle were properly charged as separate offenses and were not multiplicious for findings. He did, however, treat the two offenses as multiplicious for sentencing. We agree with the judge's rulings. Neither of the charged offenses is a lesser offense of the other; each alleges an aggravating circumstance which is not a necessary element of the other and is not alleged in the other; and each violates a different societal norm. *See United States v. Williams*, 19 M.J. 959 (ACMR 1985) (drunk driving offense including aggravating circumstance not multiplicious for findings with offense of negligent destruction of military property despite unity of time and place); *see also United States v. DiBello*, 17 M.J. 77 (CMA 1983) (unauthorized absence of extended duration not multiplicious for findings with breach of restriction because extended duration sufficient to make absence separate and distinct).

Appellant contended at his trial and does again before this court that the military lacked subject matter jurisdiction over the aggravated assault offense of which he was convicted. The offense occurred at a civilian bar approximately ten miles from the post where appellant was stationed. The victim of the assault was another servicemember. At the time of the assault both appellant and the victim were dressed in civilian clothes. The bar was frequented by servicemembers during nonduty hours, and numerous servicemembers were present when appellant physically attacked the victim. Although appellant did not know the victim prior to assaulting him, he had heard that the victim was a servicemember. Also, he believed the victim to be a servicemember because of his short haircut.

If a military accused commits an offense beyond the boundaries of the military enclave, then a court-martial's subject matter jurisdiction over that offense is dependent on a showing that it is service connected. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969). Whether or not a particular off-post offense is service connected must be determined on a case-by-case basis, applying the factors set forth by the United States Supreme Court in *O'Callahan* and *Relford*. In applying these factors, we are guided by the words of Chief Judge Everett of the United States Court of Military Appeals:

> However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (CMA 1980), which concerned off-base drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience.
>
> In so holding, we were not trying to rewrite the Supreme Court's opinion in *O'Callahan*. Instead, we sought to apply *O'Callahan* – as amplified by *Relford* – to conditions as they now exist. *Our premise was that O'Callahan permitted us to consider later developments in the military community and in the society at large and to take into account any new information that might bear on service-connection.*

United States v. Solorio, 21 M.J. 251, 254 (CMA 1986) (footnote omitted) (emphasis added).

Appellant committed an aggravated assault upon an individual whom he believed to be a servicemember. He struck the victim with his fists, kicked him, and struck him with a beer bottle. The injuries that he inflicted resulted in the victim being kept in a military hospital for two days and being absent from his duty station for one half a day. Other servicemembers who were present at the civilian bar when the assault occurred knew that appellant and the victim were both servicemembers. This knowledge, as well as widespread knowledge of the incident on post, served to make appellant an "outcast" in his squad, platoon, and company. He was ostracized by other servicemembers in his unit, several of

whom apparently wanted to avenge the victim. Appellant's misconduct generated command interest and an administrative investigation under Army Regulation 15-6[1] was directed. One of its purposes, according to a senior noncommissioned officer from appellant's unit, was to determine "why we [unit leaders] don't know what the soldiers are doing after duty hours."

Based on the facts before us, a detailed application of the *O'Callahan* and *Relford* factors is unnecessary. We find that the evidence conclusively establishes that appellant's misconduct had a significant and highly detrimental impact on military discipline, unit morale, and unit cohesiveness and effectiveness; the military had a distinct and overriding interest in deterring off-post assaults of this nature; and, that the military's interest could not have been adequately addressed by a civilian court. *See United States v. Lockwood*, 15 M.J. 1, 4 (CMA 1983), *citing Schlesinger v. Councilman*, 420 U.S. 738, 759-60 (1975). Accordingly, appellant's off-post assault of another servicemember was service connected and subject to trial by court-martial.[2]

We also note that appellant was convicted of two other offenses where service connection was not an issue. Although "pendent jurisdiction" is a concept which has never been

[1] Army Regulation 15-6, Boards, Commissioners, and Committees: Procedure for Investigating Officers and Boards of Officers (C1, 15 Jun. 1981).

[2] Both the trial counsel, Captain Paul Koch, and the defense counsel, First Lieutenant Kevin Sugg, are to be commended for their excellent in-court presentations on the issue of service connection. Not only did they make persuasive, well-reasoned arguments in support of their respective positions, but they also provided the military judge with clear, concise briefs which summarized significant civilian and military decisions in the area of service connection. Captain Koch called four witnesses in developing the government's theory on why the charged assault was service connected, and Lieutenant Sugg called one witness, introduced a stipulation of expected testimony, and had appellant testify in an effort to show that the requisite service connection was lacking. While this ostensibly was a simple guilty plea case, counsel recognized that it involved an other than simple interlocutory question and prepared accordingly. Because of their professionalism, this court was able to decide the issue with all the relevant facts before it.

directly embraced by the United States Court of Miltiary Appeals, *see Lockwood*, 15 M.J. at 7, the advantages to an accused of disposing of all charges at a single trial have been recognized. *Id.* at 7-8; *United States v. Solorio*, 21 M.J. at 251-52. In this case appellant's assault is unlike the other offenses which he committed, but does bear a relationship to them in time and place. Given the military's interest in disposing of all known offenses at a single trial – an interest presumably shared by an accused – and the advantages to both the military and an accused of having offenses tried expeditiously, these considerations provide additional support for finding an off-base offense to be service connected.[3] "Under these circumstances, there exists . . . 'a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay,' and 'this interest, in turn, helps provide a basis for finding service connection for the off-base offenses.'" *United States v. Solorio*, 21 M.J. at 258.

[3] We recognize that some support can be found in military decisional law for the principle that service connection exists whenever a servicemember is the victim of an off-post offense. The argument is made that the victim's status generates the requisite military significance, and thus any reference to the various other *O'Callahan* factors is unnecessary. *See, e.g., United States v. Hedlund*, 2 M.J. 11, 15-16 (CMA 1976) (Cook, J., dissenting); *United States v. Everson*, 41 CMR 70, 71 (CMA 1969). However, we believe that the Court of Military Appeals' most recent decision in the area of subject matter jurisdiction continues the requirement for an analysis of the *O'Callahan* and *Relford* criteria in resolving the service connection issue. *United States v. Solorio*, 21 M.J. at 255-57. Thus, we will wait for an appropriate case in which the sole service connection factor is that the victim was a servicemember to decide whether the victim's military status standing alone is sufficient to establish that an offense is service connected.

The findings of guilty and the sentence are affirmed.
Senior Judge RABY and Judge ROBBLEE concur.

For the Court:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

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